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# Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks

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# Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks

Berta Esperanza Hernández-Truyol\*

This essay, an expansion of remarks delivered at the LatCrit I Conference -- the first conference ever convened to discuss and explore critical legal thought from a Latina/o perspective -- develops a basis for articulating a LatCrit theory. As the introductory section, "LatCrit: The Voice for Latina/o Narratives" sets out, Latinas/os are a diverse community, whose identity components -- race, sex, ethnicity, language, and sexuality to name a few of the pertinent ones -- are indivisible yet diverse and varied. Such diversity, to date, has not allowed for a cohesive Latina/o theoretical model to be articulated. Rather, it has been the basis of skepticism as to whether such a model could exist. The "Culture Clashes" section details how, in the context of the majority culture in the U.S., such diversity has resulted in a fragmenting of identities within each individual depending on external social/political contexts. More specifically, "Confused Constructs" reveals that the indivisibility of the Latina/o identity components does not easily harmonize with the prevalent binary black/white legal paradigm, rendering the controlling analytical legal paradigm a vehicle to atomize Latinas'/os' indivisible identities. Indeed, the dominant construct mis/constructs the Latina/o identity by essentializing it -- thus contributing to the culture clashes *within* us. The final section

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\* Professor of Law, St. John's University School of Law. Many thanks to Kimberly Johns (the best research assistant for which anyone could hope) for her outstanding work on this essay. Many personal thanks to Cal Western for its generosity in hosting this truly historic event and in particular to Professors Frank Valdes, Laura Padilla, and Gloria Sandrino for their magnificent organizational efforts and successes.

of the essay, "Reality Checks," proposes that LatCrit's hope is in the embracing of a non-essentialist model, one that incorporates the notion of the indivisibility of identity components -- a concept borrowed from international human rights norms -- and takes a global, rather than a parochial, perspective on rights.

## I. LATCRIT: THE VOICE FOR LATINA/O NARRATIVES

Not many Latinas/os have been involved in the critical legal movements<sup>1</sup> as critical feminist theorists,<sup>2</sup> critical race theorists,<sup>3</sup>

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1 See e.g., Symposium, *Lawyering in Latina/o Communities: Critical Race Theory and Practice*, 9(2) LA RAZA L. J. 1 (1996) [hereinafter *Lawyering*] (first meeting of Latina/o law professors to discuss critical race theory and Latinas/os); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) (review of the entire bibliography reveals only seven writers with recognizably Latina/o names, of whom only four had specifically focused on the Latina/o experience).

2 For examples of Latinas/os who have written on critical feminist theory, see Elvia Arriola, *What's the Big Deal? Women in the New York City Construction Industry and Sexual Harassment Law*, 22 COLUM. HUM. RTS. L. REV. 21 (1990); Leslie Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990); Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights - Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L. L. 605 (1996) [hereinafter Hernández-Truyol, *Women's Rights*]; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT'L L. 857 (1996).

3 For examples of Latinas/os who have written on critical race theory, see RICHARD DELGADO, *CRITICAL RACE THEORY: THE CUTTING EDGE*, (1995); Leslie Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990); Trina Grillo, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Otherisms)*, 1991 DUKE L.J. 397 (with Stephanie M. Wildman); Ian F. Haney López, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Margaret Montoya, *Máscaras, Trenzas y Greñas: Un/Masking the Self While Un/Braiding Personal Experience, Latina Heritage, and Legal Socialization*, 17 HARV. WOMEN'S L.J. 185 (1994); Juan Perea *Ethnicity and Prejudice: Reevaluating "National Origin"*

and lesbian/gay (queer) theorists.<sup>4</sup> Yet, many of us noticed that even the few Latina/o voices engaged in the critical discourse were not speaking as Latina/o voices. In lock-step with the oft-criticized inclination to atomize our various identities and address one isolated identity component at a time, their focus was not Latina/o-ness and its conflation with, for example, race, sex, and sexuality. Rather, in the general discussion, even in light of the strong critical race feminists' intersectionality challenge,<sup>5</sup> the analytical emphasis continued to be monocular: disaggregating the legal impact of race *or* sex *or* sexuality *or* ethnicity *or* language in any particular situation.

More and more Latina/o scholars, who recognized Latina/o diversity felt increasingly uncomfortable with the pre-fabricated boxes into which our views and voices were channeled for packaging by the dominant paradigm. This discomfort gave way to many private conversations and the notion that we, as legal academics working with Latinas/os in other disciplines, should explore the viability of LatCrit discourse. Thus, it was quite recently that the concept of a LatCrit movement was conceived.

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*Discrimination Under Title VII*, 35 WM. & M. L. REV. 805 (1994); Michael Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990); Gerald Torres *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice - Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991).

4 For examples of authors who have been at the forefront of the queer theory movement, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 1995 CAL. L. REV. 1, and Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994).

5 See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. FORUM 139 (noting that a blackwoman's position can not be properly understood simply by looking at the effects of race *or* the effects of sex).

Just in considering whether to take on the challenge, we knew the task would be formidable. For one, the multidimensionality of Latinas/os, and the diversity that results, raised the question of whether a cohesive, theoretical, pan-ethnic<sup>6</sup> model could develop. This conference certainly represents *in vivo* the challenges that the notion of pan-ethnicity as the epicenter of a theoretical construct presents. On the one hand, pan-ethnicity could be the *raison d'être* for LatCrit discourse: our common problems are many and together we can ensure the power to find a solution.<sup>7</sup> On the other hand, pan-ethnicity could be the source of mistrust of such a theoretical construct's existence: our differences are many and will impede a common perspective from which to launch cohesive discourse.

Last October, when many Latinas/os in legal education gathered at the annual Hispanic National Bar Association ("HNBA") meeting in Dorado, Puerto Rico, the birthplace, if you will, of LatCrit, it was plainly evident that the venture would be complex. In conjunction with the HNBA's meeting, Latina/o law professors and some non-Latina/o colleagues held an all-day colloquium on legal theory and practice. While we were extraordinarily excited at gathering as a group to discuss critical legal theory -- something we had never done -- the provocative (some might call them heated) discussions throughout the day revealed our extreme diversity and multiplicity of perspectives. Before it existed, or was even named, the question arose whether a pan-ethnic theoretical construct could work. We were *Mejicanas/os, Puertorriqueñas/os, Cubanas/os, y más*. We were *blancas/os, morenas/os; rubias/os, y trigueñas/os; algunas/os* *Éramos bilingües, otras/os hablábamos solamente*

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6 The basis of the concept of Latina/o pan-ethnicity is "the pan-Latino[/a] consciousness emerging in this country" conjoined with the realization that Latinas/os "must never obscure the uniqueness of the experiences of these various Latino[/a] groups." Angelo Falcón, *Viewpoints; Through the Latin Lens*, NEWSDAY, Sept. 3, 1992, at 106.

7 The idea of pan-ethnicity is centered on the notion that, in the United States, "more brings [Latinas/os] together than separates them within the political process." *Id.*

*inglés o español.*<sup>8</sup>

The logistics of the decision on what language to use for this first meeting, alone, was emblematic of the panethnicity problems Latinas/os confront. The HNBA conference took place in Puerto Rico, where both English and Spanish are official languages. Although all the law professors who attended spoke English, not all -- including not all Latinas/os -- spoke Spanish. Significantly, some of our guests, including my aunt and uncle who attended my presentation, did not speak English. It is an understatement to suggest I was conflicted with respect to what language to use in addressing the audience. I was in Puerto Rico where I was raised in an extended family setting, where *tía* and *tío* were like another set of parents. Yet, I addressed the audience of which they were part, in their country, in a language that they did not understand and that was foreign to us as a family. It was disconcerting to know that regardless of what language I spoke someone would be left out. In the end, I *felt* that I must speak English so that law faculty colleagues -- Latinas/os and non-Latinas/os alike -- would not be excluded. However, that choice effectively excluded some of my family; I counted on *mami* and *papi* to translate for *tía* y *tío*.

As this example shows, existing combinations and permutations of our identity components place us sometimes together, sometimes uncomfortably at odds. Some of us felt invisible, and had the voice and forum to say so. Thus started the conversations that prodded us to explore further, boldly to go to an undefined, exciting, and inspiring place.

I recall how the name LatCrit was born. The evening after the colloquium work was completed some of us gathered at Celina Romany's beautiful home *en mi viejo San Juan*.<sup>9</sup> We, as friends who live in different cities are prone to do, talked into the late hours

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8 Author's translation: "Some of us were bilingual, others spoke only English or Spanish."

9 Author's translation: "In my old San Juan." "En mi viejo San Juan" is actually the title of a beautiful song about old San Juan.

about the developments of critical theory over the last decade, and about the challenging issues and intersectionalities that became apparent in the course of the colloquium. Of course, we were engaging in this discussion from a Latina/o perspective and much of the discussion centered around the virtual absence from the general critical discourse of Latina/o voices, the consequent invisibility and silencing of the Latina/o viewpoint -- if such a thing existed, and the energizing discussions that we had witnessed emerging from Latinas and Latinos engaged in critical legal theory discussions earlier in the day. So, we wondered out loud, is there a place for Latina/o critical legal discourse? Could such theoretical construct exist in light of the diversity of the "defining" perspective? What could it be called? We answered the last question that night: the LatCrit moniker was "in esse," as we say in Property Law.<sup>10</sup>

With this symposium, we are making history as we start exploring the other questions that were raised in San Juan. This is the beginning of the raising of Latina/o voices and of the integration of those voices into the critical legal discourse. Only such inclusion will ensure appropriate Latina/o participation in the endeavor to develop, expand, and transform the notion of law as we know it. Not that Latinas/os have not been around. A look at the symposium authors reveals persons who have been urging change for quite some time. Indeed some, like Richard Delgado, have been at the forefront of the Critical Race Theory movement since its birth.<sup>11</sup>

I posit that LatCrit is necessary because it is different from other movements. LatCrit needs to co-exist not replace current discourse. LatCrit urges change based upon a perspective provided by Latinas'/os' diverse and indivisible identities. And there lies both the richness and the challenge of the LatCrit endeavor.

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10 In esse: in being; actually existing. BLACK'S LAW DICTIONARY 776 (6th ed. 1990).

11 Richard Delgado delivered one of the keynote addresses in this symposium. See generally, *Lawyering*, *supra* note 1.

Perhaps a LatCrit movement is now possible because the numbers of Latinas/os in the legal academy have attained a level that allow a coalition to form. These numbers, however, show more than our potential; they show our diversity and our differences. Rather than be disheartened by such facts, and by the historical truth of the marginalization of Latinas/os in other critical legal discourse,<sup>12</sup> I choose to be energized by them. Indeed, Latina/o diversity provides a wonderful opportunity to take Angela Harris's challenge and make it incumbent upon LatCrits to learn from the past efforts of the Crits, FemCrits, and RaceCrits, including their successes and stresses, and build on the knowledge of this experience.<sup>13</sup> We need to accentuate the positive, particularly now when the patent backlash in our social-political environment can appear to put our varying communities -- within the Latina/o groups as well as across other communities -- at odds.<sup>14</sup> The plain truth is that we cannot allow false oppositionality to drive a wedge between us, while at the same time we must accept and embrace our differences. As Professor Harris urges, we must use these apparent tensions as a source of strength -- as points of departure for our discursive, progressive, inclusive interaction.<sup>15</sup> So with these thoughts in mind, I will articulate my nascent vision of LatCrit discourse.

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12 See generally Delgado & Stefancic, *supra* note 1.

13 See generally Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994) (urging that lessons be learned from the tensions arising from modernism to postmodernism theorizing to the benefit of critical theory, that we learn to use the high and low points to further discourse, and that we engage in an inclusive "jurisprudence of reconstruction" that accommodates "difference and identification"). For a discussion of how Professor Harris's thesis presents an excellent point from which to launch LatCrit theory, see Francisco Valdes, *Foreword - Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LARAZA L.J. 1 (1996).

14 See, e.g., Cal. Prop. 187 (1994) (an anti-immigrant proposal patently aimed at Latinas/os but that was supported by the Asian communities in California).

15 See generally Harris, *supra* note 13.



## II. CULTURE CLASHES

Initially, the notion of culture clashes should not evoke an "us versus them" oppositional stance. Rather, it is intended to evoke the various, sometimes competing, identities that each person possesses, which often, when applying the dominant single-trait paradigm, are rendered as competing identities. To be sure, the "competing" aspect is not one that redounds, or should redound, to making essentialist choices about one's identity. Indeed the tension of identities often is contextual. On the one hand there is the varied, but self-imposed attribution of identities. In contrast, there are the identities that are attributed to the individuals by the group, community, or society with which the individual is interacting.

Culture clashes, thus, result from the Latinas'/os' multidimensionality. LatCrit's contribution can lie in transcending the concept of varied identities as intersecting and, instead, re/visioning our identities as indivisible (and interdependent). We cannot choose our identities, nor can we fragment them. Thus, we should not let others choose or atomize them for us.

Although the last comment may appear on its face to contradict my starting point of indivisibility, a close analysis reveals it is fully cohesive. I, Berta, am Latina. I was born in Cuba, lived in Puerto Rico through high school, then came to the U.S. for college. My *mami* y *papi* both were born in Cuba, as were all my grandparents except for my maternal *abuelo* who was born in Palma de Mallorca in the Balearic Islands. *Mami* is a Cuban trained lawyer and a doctor of diplomacy who worked with the Cuban Department of State until we left the island in 1960.<sup>16</sup> *Papi* is an accountant who recently retired from banking. My Latinaness is both an ethnic and a gender identity; the traits are indivisible. Simply because I stand before a community of color does not, and cannot, mean that my

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16 I told my learning story in Berta Esperanza Hernández-Truyol, *Building Bridges - Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994).

gender, and all the cultural trappings that entails-- both of society as a whole and of *la comunidad Latina* -- disappears. Similarly, my ethnicity cannot dissolve when I address a community of Non-Latina White (NLaW) women. These identities indivisibly coexist in me, along with my sexuality, my class, my ability, my race, and so on. It can no longer be, as Professor Valdes has often said, that if he is addressing a gay audience he is Latino and if he is addressing an audience of color he is gay. The conflation of our multidimensional identities always coexists, wherever we go, with whomever we interact. And it is the myriad interdependent components of our identities that makes us each unique individuals.

One example about a Latina law student who graduated a couple of years ago -- call her María -- reveals the potential insidiousness of these culture clashes. She once told me the following story about her study group (all NLoW law students). On days that she would "do" her hair and wear make-up she invariably would get the comment: "Gee, María, you look Cuban today." She also reported that she tended to be called on often in her Criminal Law and Evidence classes: whenever a Spanish name cropped up in the case name.

As the example shows, too often others essentialize our identities rendering identity construction simply a dynamic between the inquirer and the inquired. We are who we are, but too often we are de-served depending on a) where we are: in Puerto Rico or Miami I do not "look" so different; b) who is looking at/defining us: is it a NLoW looking at me (in which case my gender and ethnicity are probably quickly noticed), a NLaW looking at me (where my Latinaness might be the salient factor), a Latino looking at me (where gender is the deviation from the "norm"), a Latina looking at me (where nationality may become an issue); and, c) whether we are comporting to alien dress norms: am I wearing something that even remotely could resemble a lawyer/law teacher uniform? All these factors enter into the internal and external construction of our identities.

Let there be no doubt, there is a huge difference between the

construction of my identities at this conference and the construction at non-minority committee functions at the American Association of Law Schools, or at the Association of the Bar of the City of New York, or even at the HNBA. In fact, the latter will likely result in different constructions if it is held in Puerto Rico, Los Angeles, New York City, Miami, or Washington, DC. Letting others define who we are results in the internalization of confused identity constructs, (mis)constructions of identity, or damaging societal fears such as racism, sexism, ethnicism, and homophobia to name a few.<sup>17</sup>

In the 1994-1995 academic year, while a Visiting Professor at Georgetown University Law Center, I taught a course on Latinas and Latinos and the Law -- a class that was the setting for a rather unique self-(mis)construction story. About four or five weeks into the course, the class was analysing issues of multidimensionality: the intersection of race, gender, and ethnicity. One student, who had been incredibly articulate and insightful in her comments, raised her hand to ask a question. I knew it was a question rather than a comment because she was wearing a furrowed brow that patently conveyed her consternation. I, now expecting some wonderful fodder for class discussion, responded with Pavlovian excitement at the sight of her hand. Well, I was not quite ready for -- nor could I ever have anticipated adequately -- what followed. Rather than her usual articulateness, when I called on the student, she started atypically stumbling over her words. She tried to start a number of sentences, each time punctuating the end of her effort with hands thrown up in the air and starting over. Finally, the student, who is a Cuban-Chinese woman, just got right to the point. "*Ay, Profesora Hernández, me tiene totalmente confundida*. Really, you have me totally confused." She continued, raising her left arm and pointing at her forearm with her right hand's index finger, "All my life I

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17 For a wonderful piece on unconscious internalizing of majority norms, cautioning as to possible harm from internalization, see generally Montoya, *supra* note 3.

thought I was white. Now I just don't know what I am." This is an intriguing identity position. It makes sense if we consider the fact that she is Cuban and was raised in Miami thus being "normativa" in that context. BUT, this is a Cuban-Chinese woman who in the context of "American" society deviates from the normative mold on the basis of race, ethnicity and gender. To consider herself "white" she had to internalize the majoritarian concepts of normativity.<sup>18</sup>

To be successful in deconstructing normativity and implementing an indivisibility construct, Latinas/os must first confront two important aspects of identity: gender and culture -- two components that in both "American" culture and in the *cultura Latina* often are at odds if we look at sex, meaning female, inequalities. Elvia Arriola's term "gendered inequality"<sup>19</sup> is at its quintessential application when we look at general demographics for Latinas. Latinas have a lower level of education than non-Latinas and are over-represented in the least skilled jobs paying the lowest wages.<sup>20</sup> In the mid-1980s, 23% of Latina/o families had women as heads of the household; of those, over 50% fell below the poverty line leading one author to conclude that "Latino[/a] families headed by women have the lowest incomes and highest poverty rate of all

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18 These concepts were discussed during the first session at this conference by Leslie Espinoza, Max Castro, Rene Nuñez, and Laura Gomez, in *Plenary Panel I: Latina/o Pan-Ethnicity?: Histories and Conditions that Unite and Divide Our Communities*, published herein as *Panel One: Latina/o Identity and Pan-Ethnicity: Toward LatCrit Subjectivities*, 2 HARV. LATINO L. REV. 175 (1997). See generally Montoya, *supra* note 3.

19 Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994).

20 See Judith A. Winston, *Mirror Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 779 n. 20 (1991) (providing statistics regarding the status of Latinas). See also Berta Esperanza Hernández-Truyol, *Las Olvidadas I - Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 IOWA J. OF GENDER, RACE & JUSTICE (forthcoming 1997) (discussing Latina demographics) [hereinafter Hernández-Truyol, *Las Olvidadas*].

family types . . . .<sup>21</sup> These statistics are not disaggregated by race, sexuality, or national origin; they include *all* Latinas, all of whom are disadvantaged based simply on their sex, ethnicity and possibly language. These are statistics that none of us -- male or female; lesbian/gay or straight; *Mejicana/o*, *Cubana/o*, *Colombiana/o*, *Salvadoreña/o*, or *Puertorriqueña/o* -- can embrace. None of us, not one man and not one woman, can afford the Latina invisibility that exists. All of us must think of the gender question when we are viewing ethnicity just like all of us must think of the ethnicity question when we are viewing gender.

This is a daunting emotional and intellectual task because our culture itself relegates Latinas to the private domain of the home where public discourse is deemed an invasion of a sacred realm. Our communities, however, must be careful not to allow culture to be used as a shield to preserve cultural practices that are grounded upon sexism and serve to institutionalize and perpetuate gender subordination.<sup>22</sup> These practices and pretexts are no more acceptable than majority racist and ethnicist practices that are used as swords to defile or eviscerate our cultures.

Moreover, these gendered practices and beliefs are not gender-bound: both Latinas and Latinos have grown up with socialized gendered images, views, and beliefs. Both Latinas and Latinos engage in and accept conduct that results in the marginalization and invisibility of Latinas. Both Latinas and Latinos must think about whether cultural practices are gender subordinating, and take active corrective action against those practices that say women are subservient, inferior.

This, too, is a difficult and complex task. I recall, not *that* long ago when I was applying to colleges, my headmaster suggested I

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21 Winston, *supra* note 20, at 779. See generally Hernández-Truyol, *Las Olvidadas*, *supra* note 20.

22 Certainly, these cultural practices that entrench gender-subordination are not limited to Latinas/os. To the contrary, it is, sadly, a global phenomenon. See generally Hernández-Truyol, *Women's Rights*, *supra* note 2 (reviewing the reality of global gender subordination and proposing a formula for reform).

take advantage of Cornell University's early admissions program. He wanted me to enroll in a real Ivy league school (mind you, I had no clue what this was), not one of the all-women "sister" schools. As far as he knew (and that was all the knowledge I had) Cornell was the only Ivy league school taking girls. Now I know that he was wrong, Yale had started accepting women that year. I was happy to fill out one rather than six applications to schools so I said "o.k." That weekend I started completing only the Cornell application, but proceeded to fill out all six. I did not apply to Cornell's early admissions program. On Monday I reported to my headmaster what I had done and explained why: early admissions was only for boys. "That's absurd," he said, and proceeded to write a letter to the office of admissions advising them that I had made a mistake and to kindly consider me for early admissions. He got a response: early admissions is only for boys.

I tell this story because I want to give context to my plea for gender inclusion and sensitivity. At the time, I had no sense that there was anything *wrong* with the "boys only" rule. It was simply the rule; a neutral, objective fact that must have had a reason for being. I was totally nonplused; not angry, not inquisitive, nothing. I just accepted the norm. I posit that LatCrit, as a gender inclusive and sensitive theoretical model, can aid in seeking to prevent such passive acceptance of gender inequality as norm or culture.

With the goal of imbuing LatCrit with gender sensitivity and inclusion I am going to point to two specific things. Language is one. I am not Latino. I am Latina. The use of male-gendered language as the norm that is deemed to encompass the female is no more acceptable than to use the term "he" to include "she" -- also once upon a time explicated as a "rule."<sup>23</sup> Reviewing the notion of gendered "gender neutral" terms one author has noted, "We notice

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23 For the impact of gendered language on legal reasoning see Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 887 (1989) (noting that "[l]anguage matters [ ] [l]aw matters [ ] [l]egal language matters").

in language as well as in life that the male occupies both the neutral and the male position. This is another way of saying that the neutrality of objectivity and of maleness are coextensive linguistically, whereas women occupy the marked, the gendered, the different, the forever-female position."<sup>24</sup> This exclusion is particularly felt in gendered languages such as Spanish.<sup>25</sup>

Yet the gendered-language female-exclusion -- what Professor MacKinnon refers to as male as norm and as male -- persists in Spanish: it is "business as usual" -- explained away by archaic rules of grammar that "say so." In this writer's views, then the rules are simply wrong. While in Spanish including women might be more linguistically cumbersome than adding an "s" in parentheses in front of "he", if linguistic clumsiness excuses sexism then we might as well concede defeat now. Yet, even with increased gender awareness this gendered practice persists. For example, I am proud and honored that these proceedings will be published in the Harvard Latino Law Review; however how onerous would it be to call the publication the "Harvard Latina/o Law Review" and include *all* Latinas/os? Is one letter really all that much effort that it is worth rendering the most marginalized of groups even more invisible and silent? Gendered names mean gendered exclusion which results in gendered injustice.

Another different but related example of culture-based gender subordination that continues is the nature and form of the custom of women taking their husbands' names. Here are two interesting versions I have heard. First, one of my students, a Latino, tells his significant other, a feminist non-Latina woman of color, that the custom (read: the proper cultural practice) of a woman taking on her husband's name is grounded upon a showing of respect. Let us

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24 CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 55 (1987).

25 Of course it is not limited to Spanish, the same problems arise in French. One interesting effect in French is the gendered consequence in human rights literature where, for example, the Universal Declaration on Human Rights is called the Declaration des Droits de l'*Homme* [emphasis added] (author's translation: "Declaration on the Rights of *Man*").

pause for a moment to consider this proposition. Respect? Whose for whom? From whom to whom? And, if as I surmise was the case, the Latino was explaining that a wife should take the husband's name out of respect, does it not make sense then that the husband also ought to take the wife's name out of a similar respect? Or is the message here that women, while obligated to show respect to the men, simply do not deserve it themselves? Regardless of what one's views and personal choices are, to ground (or wed) the practice of wife-takes-husband's-name to a notion of respect effects culture-wide, culture-bound gender subordination to which not one person should accede.

The other interesting narrative on the "taking the husband's name" custom I heard once when I was engaged in a name conversation within earshot of my father. *Papi* piped up, "*Mi hija, para que tu veas, en Cuba en esa cosa de los nombres teníamos un sistema mejor. Allá, por ejemplo, tu mamá no se tenía que cambiar su nombre. En vez, ella solo añadía 'de Hernández'.*"<sup>26</sup> Well, at first blush it may appear that this is, indeed, a better system, although one might immediately wonder whether the husband would also add "*de* [wife's name]". Distasteful as it would be (and as repugnant as the implications are, given the translation that follows), at least this option would not be gender-subordinating. Rather, it would provide information about someone's notion of personhood in the context of matrimony. However, a literal translation sheds a totally different light on the topic -- it provides a completely changed, and unacceptable, significance to the apparently simple addition (and tradition). "*De*" means "belonging to"; *de Hernández* means belonging to Hernández -- a concept of ownership that our society rejected with the Thirteenth Amendment.

Normativity, in all its forms -- be it maleness, whiteness, or

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26 Author's translation: "My daughter [note: that is a literal translation in Spanish but it is an endearment as well], you see, in Cuba in this thing about names we had a better system. There your mother wouldn't have to change her name. Instead, she just would add 'de Hernández'".



straightness -- creates a false sense of universality of what is right, desired, and desirable. At one time, this idea was used to support racial subordination.<sup>27</sup> Relativity -- cultural contextualization -- compared to the universal, can also negatively affect an identity construct for, as shown above, it can be used as a pretext to support cultural practices or traditions that effect subordination. Both universality and relativity have been used to subjugate women. The consequence has befallen Latinas based on sex and race and ethnicity.

Thus, as far as traditional analysis provides, defining identity as anything other than multidimensional, results in an essentializing of self that I, for one, reject. I am all that I am all of the time. It is the conflation of factors that makes me react, feel, think, and express the way I do. An integral part of my self is not, cannot, and does not become detached simply because of context. Such essentializing results in positioning the self as real *vis à vis* the particular selected "ism" which is only a part of the self, rendering all the other indivisible parts effectively invisible. Latinas/os are the multiplicity of our identities not the fragmentation or atomization of them. Audre Lorde expressed a similar sentiment:

As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of myself. But this is a destructive and fragmenting way to live. My fullest concentration of energy is available to me only when I integrate all the parts of who I am, openly, allowing power from particular sources of my living to flow back and forth freely through all my different selves, without the

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27 See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (rejecting a Fourteenth Amendment challenge to segregation -- "Jim Crow" -- laws).

restrictions of externally imposed definition. Only then can I bring myself and my energies as a whole to the service of those struggles which I embrace as part of my living.<sup>28</sup>

To be sure, an indivisibility approach is a challenge, but it also can serve as a coalition-building premise. If we are mindful of our myriad indivisible, interdependent identities, we as a people will be more sensitive to each other, less likely to marginalize and render invisible some in our midst, and be freer to be who we are.

### III. CONFUSED CONSTRUCTS

Much of the diffusion, conflation, and confusion of identities results from the jurisprudential construction of equality. Equality theory, one would think, ought to engender liberty; unfortunately, its refuge is a jurisprudence of doubt.<sup>29</sup> To be sure, equality is one of those elusive concepts, difficult to define or articulate in positive terms;<sup>30</sup> but no doubt we know inequality when we see it.<sup>31</sup> Indeed, over the course of United States history, the Supreme Court has left a checkered trail in its grapplings with the Constitutional mandate to provide for "*equal* protection of the laws."<sup>32</sup> Today, the Court continues to grapple with, and balk at, the challenges of defining

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28 Audre Lorde, *Age, Race, Class and Sex: Redefining Difference*, in OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES 285 (Russell Ferguson et al. eds., 1990).

29 See *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992) (O'Connor, J.) ("Liberty finds no refuge in a jurisprudence of doubt.").

30 See Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 STETSON L. REV. 701, 701-04 (1994) (describing neutral equality theory, Catharine MacKinnon's women's inequality theory, Robin West's hedonic theory, and Margaret Radin's pragmatic theory).

31 Potter Stewart used these words to explain what pornography that although he could not define pornography, he knew it when he saw it.

32 U.S. CONST. amend. XIV, cl. 1 (ratified 1868).

and securing real, not virtual, equality.

The state of legal developments is so replete with confusion and inconsistency that it arouses not only doubt but even suspicion. For example, courts even have difficulty defining sex. Concepts of sex include sex (meaning gender),<sup>33</sup> sex (meaning sex),<sup>34</sup> and sex (meaning sexuality) which depending on whether it is normative (meaning heterosexual)<sup>35</sup> or not (meaning homosexual)<sup>36</sup> can be either good or bad. One exception to such binary approach exists with sex in the trenches where it all is bad and thus a reason to keep all women<sup>37</sup> and gay men<sup>38</sup> out, so that our boys in uniform can tend to the serious business of defending the country. We have seen constructs of race, and concepts of hate, religious freedom, and establishment of religion manipulated to preserve hegemony, the

33 See *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (holding that state-sponsored nursing school could not deny admission to males based solely on their gender under Equal Protection Clause of the Fourteenth Amendment); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that discrimination based on gender is subject to Equal Protection Clause scrutiny).

34 See *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986) (sexual harassment is sexual discrimination).

35 See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that the states could not prevent interracial marriage as marriage was a vital personal right); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that marital privacy, in regards to a statute forbidding the sale of contraceptives, is within the penumbra of constitutional guarantees).

36 See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there is no fundamental privacy right to homosexuality).

37 See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that act requiring registration of only men was constitutional, focusing on military needs rather than on equity).

38 An example of this is the "gays in the military" fear that led to the don't ask, don't tell, don't pursue ("DADTDP") compromise early in the Clinton presidency. Of course, this policy includes lesbians, but interestingly very little was said, heard, or seen about lesbians during the DADTDP hearings. Besides, lesbians, in wearing the "gender" hat (as opposed to the sex meaning sex [sexuality] hat) are excluded from the trenches in all events. See generally Menkel-Meadow *infra* note 40.

power status quo.<sup>39</sup>

The Supreme Court is not alone in its attempts to ascertain the meaning of true or real equality. For example, feminist scholars have grappled with three different approaches to constitutional equality: neutral equality, special treatment, and recognizing and accommodating differences.<sup>40</sup> A noted scholar suggests that it ought to be the subject position that drives the equality concept and thus takes a dominance approach to equality which focuses on women's subordination -- women's *un*-equality.<sup>41</sup> Still another theoretical proposal is the "pragmatic" perspective that suggests that women should take whatever approach works.<sup>42</sup> Because of the entrenched monocular legal approach, however, none of the theoretical constructs is fool-proof; all, indeed, are flawed. Take neutral equality, for example, in the context of pregnancy. In that view, pregnancy -- the unique *ability* women have to carry and deliver a child -- is deemed to be a *disability* not well suited (indeed, rather awkwardly suited) to an equality analysis.<sup>43</sup> Only in a confused construct can such a capacity, and endowment, result in viewing the person/group with the capability as *less* able or *disabled* -- in sum,

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39 See, e.g., *R. A. V. v. St. Paul*, 60 U.S.L.W. 4667 (1992) (ordinance prohibiting display of a symbol that arouses anger, alarm or resentment on the basis of race, color, creed, religion or gender unconstitutional); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. MI 1989) (university policy on discrimination and discriminatory harassment, which prohibits stigmatizing or victimizing individuals on basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, etc, unconstitutional); but see *Wisconsin v. Mitchell*, 113 Sup. Ct. 2194 (1993) (statute enhancing sentence when defendant intentionally selects victim on basis of race constitutional).

40 See Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 46 (1987). The notion of neutral equality, i.e., treating similarly-situated people similarly, was first articulated in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

41 See MACKINNON, *supra* note 24.

42 See Becker, *supra* note 30, at 701-704 (describing the traditional formal equality approach and three alternative strands).

43 See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (denial of disability insurance on basis of pregnancy not sex discrimination).

*unequal.*

The role of normativity is of particular importance in leading to such anomalous legal analysis. Any consideration of equality in these terms incorporates the "equal to what?" question. The point of departure -- the "what" -- is entrenched in traditional legal thought -- purportedly objective, rational, and neutral. This "what" is then constructed (embellished) around the aspirational, normal (but really mythical) "reasonable man" -- the accepted normative model. This "reasonable man" was made in the image of the heroic "founding fathers," and resulted in a skewed model. This archetype of normalcy is gendered (male), racialized (white), ethnicized (Western European/Anglo), classed (formally educated and propertied), sexualized (heterosexual), religious-based (Judeo-Christian), and ability-defined (physically and mentally). Each of the indicia of normativity becomes part of a rite of passage and each individual's divergent traits represents a deviation from the norm, a degree of separation from the aspirational paragon, a mark of a deficiency or defect. Such deviation from the norm is both a symptom of inequality and its justification.

This static model is anathema to a heterogeneous, democratic, and ever-changing society. Thus it is not surprising that the unprincipled normative intransigence of this model and its concomitant social/cultural/political inertia (of rest, not motion) has been subjected to serious challenge. LatCrit, it is my hope and vision, will be a forceful, multi-dimensional challenge to the hegemonic conservatism (backlash) that normativity has imposed on the law. LatCrit will allow for attainable aspirations, not false norms, for equality in our heterogeneous society. Two recent equality conundrums in the context of which LatCrit can have immense impact are the recent erosion of affirmative action programs and the new anti-immigration laws.

Nowhere in our jurisprudence does the issue of equality create more polarity than in the area of "affirmative action." Narrowly defined, affirmative action consists of race-, ethnicity-, and even sex-based "preferences." The concept, coined in the height of the

civil rights era, was intended to make equality a reality for those who for essentially the entire history of this country had been excluded and marginalized from enjoying the fruits of social, technical, employment, and educational progress. The Civil Rights Acts, barring discrimination in employment, education, housing, and even immigration on the basis of race, sex, color, national origin, and religion, were the vehicles that would make the dream of equality come true.<sup>44</sup> Recently, with the affirmative action debate, this dream has become a nightmare.<sup>45</sup>

Ironically, although affirmative action takes many forms, the only models under attack are those models that grant "preferences" (read: unfair advantages) to all persons of color and majority women. Sometimes the opposition to these programs take the paternalistic view that the programs "stigmatize" those they seek to protect. The *Hopwood*<sup>46</sup> decision, with its extensive references to *Adarand*,<sup>47</sup> *City of Richmond*,<sup>48</sup> and *Metro Broadcasting*<sup>49</sup> -- all decisions taking away those "unfair preferences" from undeserving and less qualified (by normative standards, mind you) minorities<sup>50</sup> -- is replete with allusions to how demeaning such preferences are to

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44 See Civil Rights Acts of 1964, 1965, 42 U.S.C.A. § 2000e *et seq* (1994).

45 See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (racial preferences in bidding unconstitutional); *Texas v. Hopwood*, 78 F.3d 932 (5th Cir.) (holding racial preferences in law school admissions unconstitutional), *cert. denied*, 116 S. Ct. 2581 (1996).

46 See *Hopwood*, 78 F.3d at 932.

47 See *Adarand*, 115 S. Ct. at 2097.

48 See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding racial preferences in bidding unconstitutional).

49 See *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) (allowing racial preferences in issuing licenses met strong dissent from Justices O'Connor, Rehnquist, Kennedy, and Scalia). Justice Thomas who joined the Court after this decision, teamed up with the *Metro Broadcasting* dissenters to convert that dissent into the majority position in *Adarand*.

50 *Hopwood* was a suit brought by white students who, having failed to meet the standards set for students, had higher scores than the average for the incoming students of Mexican American, Puerto Rican, or African American demographics. See *Hopwood*, 78 F.3d at 932-37.

those who are consequently stigmatized by obtaining a seat in law school or a job, simply because of their race.

Paul Rockwell in his article *Angry White Guys for Affirmative Action*<sup>51</sup> describes the duplicity of this "stigma" argument. First, he notes that "[w]e hear a lot about the so-called stigma of affirmative action for minorities and women [and] [w]e are told that affirmative action harms the psyches of African-Americans, Latinos[/as], and women."<sup>52</sup> Then he unearths the disingenuousness of such an assertion.

It is a strange argument. Veterans are not stigmatized by the GI Bill. Europeans are not stigmatized by the Marshall Plan. Corporate farmers are not stigmatized by huge water giveaways and million-dollar price supports. The citizens of Orange County, a Republican stronghold, seeking a bailout to cover their bankers' gambling losses, are not holding their heads in shame. The \$500 billion federal bailout of the savings and loan industry, a fiasco of deregulation, is the biggest financial set-aside program in U.S. history. Its beneficiaries feel no stigma.

Only when the beneficiaries of affirmative action are women and people of color is there a stigma. Where there is no racism, or sexism, there is no stigma.

Affirmative action is already part of the fabric of American life. We are all bound together in a vast network of affirmative action . . . .<sup>53</sup>

Notwithstanding the patent infirmity of this "stigma" rationale, the Supreme Court has embraced it as an appropriate basis to

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51 Paul Rockwell, *Angry White Guys For Affirmative Action* (visited Oct. 21, 1997) <<http://www.inmotionmagazine.com>> .

52 *Id.*

53 *Id.*

dismantle *racial* preferences.<sup>54</sup> Yet, veterans' preferences<sup>55</sup> and alumni preference<sup>56</sup> remain constitutionally in place.

The irony of these results is inescapable. For example, in *Hopwood* the court rejected any consideration of race even in instances in which, as was the case at the University of Texas, historic *de jure* discrimination had been confessed. The *Hopwood* court plainly stated that "[w]hile the use of race per se is proscribed . . . [a] university may properly favor one applicant over another because of his[her] . . . relationship to school alumni."<sup>57</sup> Only in a very confused construct of equality can this be considered, as the court expressly declared, color-blind.<sup>58</sup> How in a system in which, because of its conceded discrimination throughout history, the alumni body is overwhelmingly racially homogeneous (white), can an alumni preference be color-blind? This is as perplexing a premise as pregnancy not being sex-related<sup>59</sup> and Spanish language ability not being national-origin related<sup>60</sup> -- two concepts that under our neutral jurisprudence have been confirmed as constitutionally sound.

In the name of equality, the Supreme Court now requires color-blindness -- a concept that declares the constitutional irrelevancy of race. I find this an interesting concept at the eve of the twenty-first century. Where was this fair and neutral concept of color-blindness in the last few illustrious decades, decades during which women and

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54 See *City of Richmond*, 488 U.S. at 493 ("[unless [race-based classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") [emphasis added].

55 See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

56 See *Hopwood*, 78 F.3d at 946.

57 See *id.*

58 *Id.*

59 See *Geduldig*, 417 U.S. at 484 (denial of disability insurance on basis of pregnancy not sex discrimination).

60 See *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (not equating "national origin with the language that one chooses to speak"), *cert. denied*, 449 U.S. 1113 (1981).



men of color could not speak, could not vote, could not work, could not own a home, could not ride in the front of the NLWs buses, go to their schools, play on their teams, use their bathrooms, eat at their counters, or drink from their water fountains. The eve of the twenty-first century is some interesting time to call upon a notion of color-blindness.

It is noteworthy that this chaotic notion of justice is replaying itself in the anti-immigrant initiatives. Justice Scalia justifies color-blindness based upon the notion that we are all simply human beings constituting an "American" race.<sup>61</sup> At the same time, Congress apparently is seeking to re-define the American race. Notwithstanding our constitutional provision that "[a]ll persons born . . . in the United States . . . are citizens of the United States . . ." elected Senators and Representatives are contemplating a movement that would effectively repeal this constitutional right. The proposal would deny citizenship to persons *born* in the United States if their mother is not in the country legally.<sup>62</sup> A constitutional amendment to deny citizenship to one *born* in the United States would defile the very basis of the foundation of this country as new home for those seeking freedom and prosperity in this land of opportunity.

Nonetheless, federal initiatives, like local counterparts, target the presence of so-called "illegal aliens" -- a telling moniker in itself as the *people* are not illegal, although their presence within United States borders may well be, and the *people* are not "alien" they are simply foreign nationals -- for wreaking havoc with our economy by taking jobs away from deserving Americans (although there is ample proof that "they" take jobs that Americans will not perform),<sup>63</sup>

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61 *Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring).

62 There is a resolution before Congress, H.J.R. 88, by Callahan (R-AL), which seeks to amend the U.S. Constitution in order to deny citizenship to those born in the United States unless at the time of birth a parent is a citizen. H.J.R. 64 by Gallegly (R-CA) would restrict citizenship even further to only those persons with mothers who are citizens or legal residents.

63 See generally Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: an International Human Rights Strategy*, in IMMIGRANTS OUT!: THE

by depleting our coffers by virtue of using our health facilities and educating their children in our schools (although it is well established that the targeted immigrants -- Mejicanas/os, Salvadoreñas/os, and Guatemaltecas/os who enter California without documentation -- every year give more to national, state, and local economies than they receive in services),<sup>64</sup> and just their general and overall criminality, ironically proven by their very undocumented entry into and presence within our borders.

That outsidership/otherness plays a role in these nativistic trends is made patent by a review of how other non-U.S. nationals are treated. Lack of papers alone as a symbol of criminality is very limited as such documentation is not even necessary for many other foreigners to enter into the U.S. legally.<sup>65</sup> For example, the visa waiver program allows persons who are residents of twenty-two selected countries, largely from Western Europe, to stay in the United States for up to ninety days simply by purchasing a round-trip ticket.<sup>66</sup> These "undocumented" are "significant abusers of the system" with the Immigration and Naturalization Service estimating they constitute between five and ten percent of the "illegal immigrants who overstayed their visas."<sup>67</sup> Further, visa overstays constitute over fifty percent of the illegal presence in the United States.<sup>68</sup> With these figures, nativism and xenophobia, and a disdain, dislike, and fear of *certain* others/outsideers are clear

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NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 254 (Juan Perea ed., NYU Press, 1997)(discussing term "illegal alien" and reviewing jobs performed) [hereinafter Hernández-Truyol, *Collision*].

64 See Michael Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 227-34 (1994) (citing figures that conclude that immigrants contribute \$90 billion in taxes while taking only \$5 billion in social services).

65 See Immigration and Nationality Act, 8 U.S.C.A. §§1101 *et seq.* (1994). See also, Hernández-Truyol, *Collision*, *supra* note 63, at 255.

66 See Immigration and Nationality Act, *supra* note 65, §§1101 *et seq.*

67 Ashley Dunn, *Greeted at Nation's Front Door, Many Visitors Stay on Illegally*, N.Y. TIMES, Jan. 3, 1995, at A1, B2.

68 See, e.g., *id.*

justifications and pretexts for such differential treatments of non-nationals. However, such differential treatment follows the pattern of the confused notions of equality in our jurisprudence.

#### IV. REALITY CHECK

So any self-preserving, if by now admittedly not sane, person must ask herself, what difference can LatCrit make? With the jurisprudential notions of equality being as chaotic, disconcerting, and befuddled as they are, with the Latina/o communities being as diverse as they are, is there any possibility, remote or attenuated as it may be, that we can go somewhere with this pan-ethnic movement? I think so. I hope so. I dream so.

So there are glitches. If I were to let that bother me I would not be able to continue teaching and writing and I would return to the safe haven of the practice of law where, as a commercial litigator, my soul was seldom at issue. However, the project (and its process) is not going to be easy. *Al contrario, tenemos un tremendo reto frente nosotros/as. Pero unidos, conscientes de, pero aceptando, nuestras diferencias y múltiples dimensiones, no hay obstáculo que no podamos sobreponer.*<sup>69</sup> But the foundation must lie on the recognition of the indivisibility construct and our acceptance that although we may not like, understand, or agree with all our neighbors and their issues, well, we have to love them.

This commitment, of course, is a difficult one, for we must commit to asking questions we do not want to ask, hear answers we do not want to hear, and embrace people we might be afraid to embrace. But if not now when? If not us, who? We have the diversity to give us the strength to carry out this challenge. In our "us" we can include persons of every size, shape, form, gender, sexuality, race, color, religion, class, and ability. We have engaged

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69 To the contrary, we face a tremendous challenge. But together, simultaneously recognizing and embracing our differences and multidimensionality, there is no obstacle that we cannot overcome.

with our *familias* for years -- *abuelas/os* from the "old country," whichever one that may be, and *hermanas/os* from the new one, often speaking a different tongue; we have supported each other for years, writing tenure letters and reviewing articles; we have fought for our causes for years, writing briefs, attending rallies. It is time we join our intellectual strengths and make sense out of the nonsense that surrounds us calling itself law.

We have to keep our diversity in the foreground because, and some might see this as ironic, that is where our strength lies. Both Linda Chavez and Cesar Chavez want to educate our kids. And if those two can share a goal, who knows, we might be able to eat grapes in the near future. Here are the questions to always ask: The ethnicity question -- what are the implications of a practice/action/law to our ethnic group? The gender question -- are there particularized implications of the practice/action to Latinas? And so, following this pattern we must ask the alienage question; the race question; the language question; the sexuality question; the class question; the ability question. We have to own up to the reality check that we *are* all those groups. Thus, we have to be willing to work together to further ourselves, in spite of ourselves. We have to purge ourselves of our internalized racism, sexism, heterosexism, classism, ethnicism, elitism.

I am going to step forward and face the challenge. I will start by doing an unpopular thing: I am going to "out" us as imperfect, be a little critical of us. This exercise is intended in the constructive vein in which Angela Harris has presented the venture: so that we can recognize our past successes and stresses and mistakes, learn from them, and not repeat them. With respect to our achievements as well as our failings let us be neither unduly elated nor foolishly self-deprecatory. While we continue to focus on the positive, we must not overlook the blunders/exclusions that we effect ourselves, probably by virtue of the internalization of that normative hierarchy which we then echo, lest we then replicate those mistakes. So I say to the Latinos in our midst, do not make Latinas the truly

*olvidadas*;<sup>70</sup> to the sexual normativos/as, do not marginalize the gays and lesbians; to the *más blancas/os*<sup>71</sup> do not exclude the *indias/os*, *mestizas/os*, *morenas/os*.

Let us be the first movement that can pride itself in not being gender/race/class/religion/sexuality/ethnicity essentialists. We have seen what it has done to the Crits. Women's feeling of exclusion engendered the FemCrits. Ironically, the FemCrits failed to learn from their own exclusion and the movement was overwhelmingly racially essentialized. Similarly, persons of color who felt excluded from the critical movement formed the RaceCrits who, while more inclusive, still felt the strain of the emerging Critical Race Feminism. In addition, the RaceCrit discourse so centered in the black/white paradigm that it overlooked issues related to ethnicity and sexuality.

One final component that LatCrit discourse should incorporate is a global perspective. We should expand our perspective to include international human rights protections. At a time of contraction in domestic civil rights protections, such norms offer hope with respect to many of Latinas'/os' concerns.<sup>72</sup> One of the centerpieces of international human rights documents is the protection of persons (not the narrower class of citizens) from discrimination on the bases of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.<sup>73</sup> Every

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70 Author's translation: "forgotten ones".

71 Author's translation: "lighter complected persons".

72 Of course, for the international obligations to apply against the United States, it must have acceded to them either by ratification of an instrument or by virtue of their existence as customary law. For an explanation of the nature of international obligations see generally Hernández, *Collision*, *supra* note 63.

73 These protections are included in the Universal Declaration on Human Rights ("Universal Declaration"), the United Nations Charter ("Charter"), the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on the Elimination of Racial Discrimination ("Race Convention") (which includes ethnicity in the definition of race), the Covenant on Social, Cultural and Economic Rights ("Economic Covenant"), the Convention on the Elimination of All Forms of Discrimination Against Women, the regional conventions

single one of these status protections can be employed by Latinas/os to protect persons from our communities. For example, international norms expressly protect language, a right absent in our national laws.<sup>74</sup>

Moreover, various international instruments protect the rights to

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("European Convention", "American Convention" and "African Convention"), numerous other human rights agreements, United Nations declarations and resolutions, and myriad conference documents, including the recently held international conferences on Human Rights (Vienna, 1993) and Population (Cairo, 1994), the Social Summit (Copenhagen, 1995), the Women's conference (Beijing, 1995), and Habitat II (Istanbul, 1996).

74 See, e.g., *Hernández v. New York*, 111 S.Ct. 1859 (1991); *Garcia v. Gloor*, 618 F.2d 264 (1980), *cert. denied*, 449 U.S. 1113 (1981).

health,<sup>75</sup> education,<sup>76</sup> privacy and family,<sup>77</sup> liberty and security of the person,<sup>78</sup> travel,<sup>79</sup> information,<sup>80</sup> and freedom of association.<sup>81</sup>

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75 For example, the Economic Covenant, 993 U.N.T.S. 3, annex to U.N.G.A. Res. 2200, at art. 12 (adopted by the U.N.G.A. on Dec. 16, 1966, entered into force on Jan. 3, 1976) ("right of everyone to the enjoyment of the highest attainable standard of physical and mental health"); Universal Declaration, U.N.G.A. Res. 217, Dec. 10, 1948, at art. 25; Women's Convention, U.N.G.A. Res. 280, at art. 12 (adopted by the U.N.G.A. on Dec. 18, 1979, entered into force Sept. 3, 1981); Convention on the Rights of the Child ("Children's Convention"), G.A. Res. 44/25, 44 U.N. GAOR (Supp. No. 49) at 166, U.N. Doc. A/44/736 (1989), at art. 24, *reprinted in* 28 I.L.M. 1448 (1989) (adopted Nov. 20, 1989); African Charter on Human and Peoples' Rights ("African Charter"), OAU Doc. CAB/LEG/67/3/Rev. 5, at art. 16 (1981), *reprinted in* 21 I.L.M. 58 (1982).

76 Universal Declaration, *supra* note 75, at art. 26 ("Everyone has the right to education"); Economic Covenant, *supra* note 75, at art. 13; Children's Convention, *supra* note 75, at art. 28; African Charter, *supra* note 75, at art. 17; Women's Convention, *supra* note 75, at art. 10; Charter of the Organization of American States ("OAS Charter"), 119 U.N.T.S. 3, entered into force Dec. 13, 1951, for the United States, 2 U.S.T. 2394, T.I.A.S. No. 2361, Protocol of Amendment, O.A.S.T.S. No. 1-a, 21 U.S.T. 607, T.I.A.S. No. 6847, entered into force Feb. 27, 1970, at art. 47 (states have to ensure effective exercise of right to elementary education for school age children); Race Convention, 660 U.N.T.S. 195, at art. 5 (entered into force Jan. 24, 1994); Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, art. 22, Apr. 22, 1954 (refugees to be given same treatment as nationals regarding elementary education).

77 Universal Declaration, *supra* note 75, at art. 12; ICCPR, 999 U.N.T.S. 171, G.A. Res. 2200, art. 17 (adopted by the U.N.G.A. on Dec. 16, 1996, entered into force Mar. 23, 1976, ratified by the United States June 8, 1992); Children's Convention, *supra* note 75, at art. 16; American Convention of Human Rights ("American Convention"), 9 I.L.M. 673, art. 111 (1970) (entered into force on July 18, 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), 312 U.N.T.S. 221, E.T.S. 5, art. 8, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, Nov. 4, 1950 (entered into force on Sept. 3, 1957).

78 Universal Declaration, *supra* note 75, at art. 3; ICCPR, *supra* note 77, at art. 9 ("Everyone has the right to liberty and security of the person . . . No one shall be deprived of his[/her] liberty except on such grounds and in accordance with such procedure as are established by law"); Race Convention, *supra* note 76, at art. 5; African Charter, *supra* note 75, at art. 6; American Convention, *supra*

These protections can all be valuable to Latinas/os in challenging xenophobic laws such as the provisions of Proposition 187 that deny health, education, and social welfare benefits.<sup>82</sup> For example, education rights and the right to information would impede exclusion of children from schools and the right to privacy would appear to shield targeted populations from inquiries when seeking health care.<sup>83</sup>

I urge that LatCrits learn from the omissions of the past and craft an inclusive, global model where truly all voices have a forum. And we should be able to, if anyone can. Those concerns we have in common are far greater than the differences that I am certain we can, in all events, resolve. To illustrate that our common interests are many, allow me to suggest a list of critical issues (in no particular order): education, immigration, health care, housing, employment, language, voting, crime, domestic violence, welfare reform, xenophobia, sexism, racism, heterosexism. That list provides enough work on which we all can agree to collaborate and furnishes us with a starting point. Significantly, working on the catalogued topics merges theory and practice -- because for LatCrit

note 77, at art. 7; European Convention, *supra* note 77, at art. 5.

79 Universal Declaration, *supra* note 75, at art. 13; ICCPR, *supra* note 77, at art. 13 (though here it is limited to those legally within the territory); Race Convention, *supra* note 76, at art. 5; American Convention, *supra* note 77, at art. 22 (though here it is limited to those legally within the territory).

80 Universal Declaration, *supra* note 75, at art. 19; ICCPR, *supra* note 77, at art. 19; Race Convention, *supra* note 76, at art. 5; Children's Convention, *supra* note 75, 13; African Charter, *supra* note 75, at art. 9; American Convention, *supra* note 77, at art. 13; European Convention, *supra* note 77, at art. 10.

81 Universal Declaration, *supra* note 75, at art. 20; ICCPR, *supra* note 77, at art. 21; Race Convention, *supra* note 76, at art. 5; Children's Convention, *supra* note 75, at art. 15; African Charter, *supra* note 75, at art. 10; American Convention, *supra* note 77, at art. 16; European Convention, *supra* note 77, at art. 11.

82 See generally Hernández-Truyol, *Collision*, *supra* note 64 (discussing possible application of international norms to challenge Proposition 187).

83 *Id.*



to have real meaning it must not be purely a theoretical endeavor, it must have a practical side that allows us to enrich our communities and fulfill their needs, fill the voids. Let us not impoverish any in our midst in order that we all can truly be enriched.

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## Five Axioms in Search of Equality\*

Juan Perea\*\*

As scholars we do not want to be criticized for asserting a conclusion without axioms and postulates from which the conclusion follows. I offer several axioms, therefore, as starting points for discussion. I do not presume to be either final or comprehensive. I do seek to fuel thought about and discussion of these and other axioms necessary to the development of LatCrit studies that move us away from the repetition of old arguments and toward a fuller realization of equality.

As I think about the problems of civil rights for Latinos/as, I always return to the same questions. Why do we remain invisible as Americans? Why is our political voice not commensurate with our numbers? Why are our voices unheard at large in articulating the meaning and content of civil rights for us? I seek to express axioms and ideas that will facilitate recognition of our unique Latina and Latino voices and add our voices to the debate on identity in America in a significant way. My axioms have unifying themes: the pervasiveness of the Black/White binary paradigm of race in America; the centrality of Anglocentric premises for full American identity; the way these premises silence Latino/a voices. I begin with the least controversial axiom, how we might understand equality.

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\* This title is inspired by and borrowed from Luigi Pirandello's brilliant play *SIX CHARACTERS IN SEARCH OF AN AUTHOR*.

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